LIBRARY
PREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 29 1970
E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 197

ROGER CALVIN ECKERD and JACK RAYMOND SCOTT,

Petitioners,

vs.

STATE OF SOUTH DAKOTA

Respondent.

GORDON MYDLAND,
Attorney General

WALTER W. ANDRE
Assistant Attorney General

State of South Dakota
State Capitol Building
Pierre, South Dakota 57501

Telephone: 605 224 3215

Attorneys for Respondent

I N D E X

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	3
STATEMENT OF THE CASE	3
ARGUMENT	4
CONCLUSION	6

CASES CITED

State v. Hanson, 176 N.W. 2d 607, 616	5
State v. Johnson, 24 S.D. 590, 124 N.W. 847	7
State v. Scott, 173 N.W. 2d 287	1
State v. Thieme, 281 Minn. 47, 160 N.W. 2d 396	6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1616

JACK RAYMOND SCOTT and
ROGER CALVIN ECKERD,

Petitioners,

vs.

STATE OF SOUTH DAKOTA,

Respondent.

RESPONDENT'S OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Respondent prays that the Petition for Writ of Certiorari to review the decision of the Supreme Court of South Dakota in the case entitled *State v. Scott*, 173 N.W. 2d 287, decided December 26, 1969, rehearing denied January 23, 1970, be in all respects denied.

OPINION BELOW

The opinion below in the Supreme Court

of South Dakota in *State v. Scott*, 173 N.W. 2d 287, is set forth in full at Appendix "A" of the Petition for Writ of Certiorari.

JURISDICTION

Rule 19 of the Supreme Court Rules states that:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The Supreme Court of the United States should deny this Petition for at least the following reasons:

1. The decision of the Supreme Court of South Dakota at 173 N.W. 2d 287 in this case in every respect is correct and there has been no violation, denial or abuse of any of the constitutional or statutory rights of the Petitioners.

2. If, for the sake of argument, Petitioners do have any claim or grievance, they have not developed same in accordance with proper procedure, or

otherwise, in the state courts or in the lower federal courts. This case should not be entertained by the Supreme Court of the United States under the present status of the record.

3. Case law indicates that the argument of Petitioners which they now present to the Supreme Court of the United States is neither persuasive nor substantially sound.

QUESTION PRESENTED

Were the rights of Petitioners under the Federal and State Constitutions and the statutes of South Dakota violated for the reason that many of the jurors at the trial of this case were acquainted with and had transacted business with the state prosecutors, thus depriving Petitioners of their constitutional right to an impartial jury?

STATEMENT OF THE CASE

Petitioners were charged and convicted, largely upon circumstantial evidence, of

burglary in the third degree and grand larceny. They were tried before an impartial jury in the Fourth Judicial Circuit Court in and for Miner County, South Dakota, the county in which the crimes were committed, and they were represented by competent counsel. On voir dire, defense counsel did not challenge individual jurors for cause for the same reasons which they now allege deprived Petitioners of their right to an impartial jury, nor did defense counsel exhaust all peremptory challenges to the jury panel. The record shows that at the trial defense counsel moved for a change of venue after all of the jurors were examined and a jury selected, based on a statement of counsel for defendants dictated into the record.

ARGUMENT

Respondent can find no reason, after reviewing this record, why defense counsel, one of whom was a local attorney, could not have challenged the individual jurors for

cause, if that was desired, on the matter of bias and alleging that many of the jurors knew and had transacted business with the state prosecutors. When defense counsel finally challenged the entire panel and moved for a change of venue, it was too late and too little. At no place or time in the trial court, as evidenced by this record, did the defense counsel support by proper affidavits, or any other proper evidence, their contention that Petitioners could not receive a fair trial in Miner County, South Dakota. Absent this kind of a record, fully developed for the Supreme Court of the United States to review, this Court presently has no alternative but to deny the application for a writ of certiorari.

That which is written in *State v. Hanson*, 176 N.W. 2d 607 at page 616, decided March 20, 1970 by the Supreme Court of Minnesota, seems particularly applicable to the instant case:

> The claim that defendant was not afforded his right to trial by an impartial jury is without merit. It is conceded that one of the jurors who sat in the case was a cousin of the sheriff. Another was remotely related to him by marriage. As could be expected in a rural county, some of the jurors had past business associations with the county attorney. But these facts were or could have been disclosed upon voir dire. For reasons which we must presume to have been adequate, the right to eliminate these jurors through a challenge for cause or by exercise of a peremptory challenge was not exercised. To say now that the makeup of the jury voided the trial is not persuasive. See, *State v. Thieme*, 281 Minn. 47, 160 N.W. 2d 396.

CONCLUSION

The Supreme Court of South Dakota was of the opinion and correctly concluded in this case:

> At the trial defendants made a motion for change of venue under SDCL 1967, Sec. 23-28-7. It is not clear whether the motion was made before or after the jury was sworn, but was made after all jurors were examined and a jury selected. It was based on a statement of counsel for defendants dictated in the record. The motion was properly denied. The cited statute requires the mo-

tion be made 'before the trial is begun' and be based on 'affidavits or other evidence.' It was not timely, *State v. Johnson*, 24 S.D. 590, 124 N.W. 847, nor was it based on affidavits or other evidence in the record before us.

We urge the rejection of the application of Petitioners for a Writ of Certiorari.

Respectfully submitted,

GORDON MYDLAND,
Attorney General
State of South Dakota

WALTER W. ANDRE
Assistant Attorney General

State Capitol Building
Pierre, South Dakota 57501
Telephone: 605 224 3215

Attorneys for Respondent

PROOF OF SERVICE

WALTER W. ANDRE, one of the attorneys for Respondent and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 29th day of June, 1970, I served copies of the foregoing Respondent's Opposition to the Peti-

tion for a Writ of Certiorari upon Clayton H. Shrout, Attorney at Law, 1004 City National Bank Building, Omaha, Nebraska, by mailing copies of such duly addressed to him with the proper postage prepaid.

Walter W. Andre

WALTER W. ANDRE, one of the
Attorneys for Respondent